

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of Sections of the
Cable Television Consumer Protection
and Competition Act of 1992

Rate Regulation

MM Docket No. 92-266

OPPOSITION
OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.

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Its Attorneys

November 24, 1993

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Time Warner Entertainment Company, L.P. ("TWE"), by its attorneys, hereby opposes the Petition for Reconsideration filed by New York Telephone Company and New England Telephone and Telegraph Company ("NYNEX") of the Second Report and Order in the above-captioned proceeding.¹ NYNEX seeks reconsideration of the Commission's decision to include the low penetration cable systems in its calculation of the competitive benchmarks for setting cable rates. Because NYNEX' four-and-a-half page pleading fails to adequately set forth any credible basis for reconsideration of this decision, TWE respectfully submits that the Commission should dismiss the Petition.

NYNEX sets forth two ostensible bases for reconsideration: that the Commission erred in concluding that it is bound by Congress' express directives in defining "effective

¹ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266, Third Notice of Proposed Rulemaking, FCC 93-428 (released Aug. 27, 1993). The NYNEX Petition for Reconsideration was placed on Public Notice on November 5, 1993. Report No. 1984.

competition," and further, that the Commission erred in rejecting the flimsy arguments set forth by certain telephone companies to exclude the "below 30" systems.² As discussed below, neither argument by NYNEX withstands analysis.

The Second Report and Order reasonably found that "to be most consistent with the clear statutory language, cable systems with less than 30 percent penetration should continue to be included in the sample of systems subject to effective competition which is used to calculate the benchmark rates." Order at para. 128 (footnote omitted). The legislative history of the 1992 Act strongly suggests that Congress was dissatisfied with prior efforts of the FCC to define the concept of effective competition, and thus sought in the legislation to define the concept itself. This construction was widely supported in the record.³ As TWE demonstrated in its Comments, the terms of the Cable Act in defining effective competition are binding upon the Commission. TWE Comments at 4-7. TWE also showed that it would be arbitrary and capricious for the Commission to have insisted upon strict adherence to some, but not all, of the

² NYNEX' second argument is based wholly upon the Joint Comments filed by NYNEX, GTE, and Bell Atlantic. At least one of those joint commenters has withdrawn its initial position taken in those Joint Comments. See "And Bell Atlantic's About-Face," 46 MIN Media Industry Newsletter (November 1, 1993); "Sen. Metzenbaum Opens Hearings on TCI/Bell Atlantic Merger," 12 Capitol Publications, Inc. (November 3, 1993).

³ See, e.g., Comments filed on June 17, 1993 by NCTA at 5-9; Colony Communications, Inc., et al. at 5-6; Arizona Cable Television Association, et al. at 3-5; Coalition of Small System Operators at 4-5; TWE at 4-6; Joint Parties at 5-8; Tele-Communications, Inc. at 5-7.

congressionally specified categories of systems subject to "effective competition." Id. at 7-11.

Independent of this legal issue, the FCC reasonably found that even if it had the authority to exclude the below 30 systems, there was no record basis for doing so. Numerous cable operators submitted extensive, expert econometric analyses showing that further changes in the benchmarks based on the advocated exclusion simply cannot be justified.⁴ These experts agreed that: (1) the below 30 systems do not reflect rates that are somehow "too high;" (2) the benchmark model itself is too broadly averaged and imprecise to form a sustainable basis for ordering further rate reductions; and (3) elimination of the below 30 systems would result in a frivolously small sample size.⁵

NYNEX offers no new or changed evidence or analysis to warrant Commission reconsideration of these issues. The current

⁴ See Comments filed on June 17, 1993 of TWE, Daniel Kelley, "Economic Issues Raised by the Further Notice," Lewis J. Perl, Linda McLaughlin, & Jonathan Falk, National Economic Research Associates, Inc., "Econometric Analysis of the FCC's Proposed Competitive Benchmarks;" Comments of Tele-Communications, Inc., Stanley M. Besen & John R. Woodbury, "An Analysis of the FCC's Cable Television Benchmark Rates;" Declaration of William Shew, Director of Economic Studies, Arthur Andersen Economic Consulting; Comments of the Community Antenna Association, Inc. See also Petition for Reconsideration of the National Cable Television Association, Inc., "The Effect of 'Competition' on Rates Differs for Large and Small Cable Systems," Economists, Inc., filed June 21, 1993.

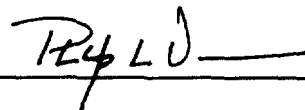
⁵ See, e.g., Comments filed on June 17, 1993 by TWE, the Joint Parties, the National Cable Television Association, the Coalition of Small System Operators, the Arizona Cable Television Association, and Tele-Communications, Inc.

10 percent reductions led the Commission to conclude that it should not take additional steps without additional, updated information. It thus rationally decided "that a more cautious approach in setting cable rates is the better course." Order at para. 130.

For the foregoing reasons, TWE respectfully submits that the NYNEX Petition be summarily dismissed.

Respectfully submitted,

TIME WARNER ENTERTAINMENT
COMPANY, L.P.

A handwritten signature in dark ink, appearing to read "PLV", is written over a horizontal line.

Philip L. Verveer
Sue D. Blumenfeld

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